OCTOBER TERM, 1952.

SPRINGFIELD INSTITUTION FOR SAVINGS ET AL.

v.

WORCESTER FEDERAL SAVINGS AND LOAN ASSOCIATION ET AL.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

RICHARD WAIT,
Attorney for the Petitioning Savings Banks,
HENRY P. FIELDING,
Assistant Attorney General.

Of Counsel:
BUTTERWORTH H. SMITH,
of Boston.

ANDREW G. SCHLOSSER & SON, LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1952.

No.

SPRINGFIELD INSTITUTION FOR SAVINGS, THE CAPE COD FIVE CENTS SAVINGS BANK, CITY SAVINGS BANK OF PITTSFIELD, FALL RIVER FIVE CENTS SAVINGS BANK, LYNN FIVE CENTS SAVINGS BANK, THE FRANKLIN SAVINGS INSTITUTION, NORTHAMPTON INSTITUTION FOR SAVINGS, CAMBRIDGEPORT SAVINGS BANK, QUINCY SAVINGS BANK, PLYMOUTH FIVE CENTS SAVINGS BANK, THE PROVIDENT INSTITUTION FOR SAVINGS IN THE TOWN OF BOSTON, WORCESTER COUNTY INSTITUTION FOR SAVINGS, AND FRANCIS E. KELLY AS HE IS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, *Petitioners*,

v.

WORCESTER FEDERAL SAVINGS AND LOAN ASSOCIATION AND UNION FEDERAL SAVINGS AND LOAN ASSOCIATION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honourable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of the petitioners Springfield Institution for Savings, The Cape Cod Five Cents

Savings Bank, City Savings Bank of Pittsfield, Fall River Five Cents Savings Bank, Lynn Five Cents Savings Bank, The Franklin Savings Institution, Northampton Institution for Savings, Cambridgeport Savings Bank, Quincy Savings Bank, Plymouth Five Cents Savings Bank, The Provident Institution for Savings in the Town of Boston, Worcester County Institution for Savings; and on behalf of the petitioner Francis E. Kelly, as he is Attorney General of the Commonwealth of Massachusetts, pray that a writ of certiorari may be issued to review the decree of the Supreme Judicial Court of Massachusetts sitting within and for the County of Suffolk (herein sometimes referred to as the County Court), entered August 1, 1952 in the suit between the above-named parties, docketed in that Court as equity number 68364 and in the Supreme Judicial Court for the Commonwealth (herein sometimes referred to as the Full Bench) as equity number 5187.

Opinions Below.

There was no opinion in the County Court. The opinion of the Full Bench delivered by Mr. Justice Wilkins is printed at pages 49-53 of the record and is reported in Mass. A.S. 1952, page 743, and 107 N.E. (2d) 315.

Jurisdiction.

The decree of the County Court, which is the subject matter of this petition, was entered August 1, 1952 (R. 56) pursuant to rescript from the Full Bench given July 3, 1952 (R. 54).

The jurisdiction of this Court is invoked under U.S.C. Tit. 28, § 1257, which authorizes this Court to review a decree of the highest court of a state

"where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, . . ."

Question Presented.

Massachusetts statutes of general application forbid any thrift institution, state or federal, to establish or operate a branch office more than fifteen miles distant from the town of its home office. The Home Owners' Loan Act of 1933 authorizes the Home Loan Bank Board, under rules and regulations promulgated by it, to provide for the operation of federal savings and loan associations. The Home Loan Bank Board has promulgated rules and regulations which provide for the establishment by such associations of branch offices but are silent as to the location of such branches. The question is whether there is such a direct and positive conflict between the Massachusetts statute and the Home Owners' Loan Act and the regulations as to make the prohibition of the statute inapplicable to a federal savings and loan association.

This question may be stated more succinctly, perhaps, as: May a federal savings and loan association maintain a branch office in direct violation of a Massachusetts statute of general application which states a reasonable rule of state public policy?

Statement of the Case.

The petitioners, other than the Attorney General, are Massachusetts savings banks carrying on a business in Massachusetts similar to and in competition with that carried on by the respondents, each of which is a federal savings and loan association, one with its home office in Worcester and the other in Pittsfield. Massachusetts

G.L. (Ter. Ed.) c. 167, § 37A (inserted by St. 1949, c. 640), provides that no such association

> "shall establish or maintain any branch . . . in this commonwealth . . . except in accordance with the same restrictions and limitations as to branches . . . applicable to similar institutions organized or operating under the laws of this commonwealth." (R. 47.)

Chapter 168, § 25, as amended by St. 1933, c. 334, § 8, provides that such similar institutions may carry on business

> "at its banking house only . . . except that the corporation may . . . maintain and establish one or more branch offices . . . in the town where its banking house is located, or in towns not more than fifteen miles distant therefrom." (R. 40.)

Prior to the establishment of the branches here in question, only one federal savings and loan association having its home office in Massachusetts maintained a branch office and that branch was in the same town as the home office (R. 26, 27).

In May of 1949, each respondent petitioned the Home Loan Bank Board for its approval of the opening and maintenance of a branch in Springfield. The regulations of the Board (24 C.F.R. [1949 ed.] § 143.16, R. 45) provided that a branch office

> "is a legally established place of business of the association authorized by its board of directors . . . No federal association may establish or maintain a branch office without the prior written approval of the Board."

Under date of September 29, 1950, the Home Loan Bank Board gave its approval in writing of the establishment of

a branch office in Springfield by each respondent and the offices were opened the same day (R. 27). Springfield is forty-one miles from Worcester and thirty-nine miles from Pittsfield (R. 26).

The next step was the institution of a suit in equity by the petitioners, other than the Attorney General, against the respondents. The bill (a class bill brought on behalf of 188 Massachusetts savings banks, R. 2-12) was based both upon equity jurisdiction to enjoin unfair competition and on the jurisdiction to grant declaratory relief given by Massachusetts G.L. c. 231A. After the respondents had answered and, among other things, challenged the constitutionality of G.L. (Ter. Ed.) c. 167, § 37A, the Attorney General filed an information (R. 19-21) pursuant to the provisions of G.L. (Ter. Ed.) c. 231A, § 8, in which he, in effect, adopted the allegations of the other petitioners and joined them in praying for a declaration that the maintenance of the two branch offices in question constituted a violation of G.L. (Ter. Ed.) c. 167, § 37A, and that their maintenance was consequently unlawful. The parties then entered into a Statement of Agreed Facts (R. 23-47), to which were appended as exhibits the pertinent statutes and regulations, and the case was reserved and reported without decision by the Single Justice of the County Court to the Full Bench (R. 1).

Several defenses had been pleaded by the respondents but the case was submitted to the Full Bench on the narrow issue of whether the provisions of section 37A applied to the respondents and made the maintenance of the two branches in question unlawful as asserted by the petitioners and denied by the respondents.

The Full Bench decided in favour of the respondents. It held that, under the Home Owners' Loan Act of 1933 and the regulations promulgated by the Board pursuant to authority granted by that act, the respondents as fed-

eral savings and loan associations had authority to maintain branch offices. It further held that, having that authority stemming from Congressional sanction, there was a direct and positive conflict between the power of the Board to approve the establishment of a branch and the attempted state limitation of the location of branches to an area not more than fifteen miles distant from the town of the principal banking office (R. 52).

A rescript, consequently, was issued from the Full Bench to the County Court on July 3, 1952 ordering the entry of a decree declaring that the Massachusetts statute

> "does not render invalid the branches which have been established by the defendants with the approval of the Home Loan Bank Board" (R. 54)

and a final decree in the same language was entered by the County Court August 1, 1952 (R. 56). No appeal or proceeding in the nature of an appeal other than this petition for certiorari is available to the petitioners.

Specification of Errors.

1. The court below erred in declaring that Mass. G.L. (Ter. Ed.) c. 167, § 37A, does not render invalid the branches which have been established by the respondents in Springfield, Massachusetts.

2. The court below erred in ruling that the respondents might lawfully establish and operate branches in Springfield, Massachusetts, more than fifteen miles from the town of the home office of each respondent notwithstanding the provisions of Mass. G.L. (Ter. Ed.) c. 167, § 37A.

3. The court below erred in ruling that there is a direct and positive conflict between the prohibition contained in Mass. G.L. (Ter. Ed.) c. 167, § 37A, as applied to a federal

savings and loan association and the provisions of the Home Owners' Loan Act of 1933, U.S.C. Tit. 12, § 1464, as implemented by regulations promulgated by the Home Loan Bank Board, Code of Federal Regulations, Tit. 24, c. I(c), §§ 143.16, 145.14.

4. The court below erred in ruling that Congress, by the Home Owners' Loan Act, granted authority to the Home Loan Bank Board to approve the establishment of branches by federal savings and loan associations and in ruling that, by that grant of authority, a direct and positive conflict was created with any state regulation dealing with the location of branches.

5. The court below erred in failing to rule that the establishment and operation by each respondent of a branch office in Springfield, Massachusetts, more than fifteen miles distant from the town of the home office of each respondent was and is unlawful since in violation of Mass. G.L. (Ter. Ed.) c. 167, § 37A.

6. The court below erred in failing to rule that the prohibition contained in Mass. G.L. (Ter. Ed.) c. 167, § 37A, against maintenance and operation by a thrift institution of a branch office more than fifteen miles distant from the town of its home office is applicable to a federal savings and loan association, both the home and the branch offices of which are located in Massachusetts.

Reasons for Granting the Writ.

The question of how far a federal savings and loan association is exempt from the requirements of state law which are binding on all of its state chartered competitors, *i.e.*, of whether those associations must fit into the established pattern of a dual banking system or may remake or destroy that pattern to suit their own purposes, presents a federal question of substance. The merits and demerits of

branch banking have provided and still provide a fertile ground of controversy. This Court established by its decision in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640, that a state may regulate the branch banking activities of a national bank when Congress has not spoken. Following that decision, the controversy over branch banking so far as it related to national banks was satisfactorily composed through Congressional action in the McFadden Act (44 Stat. 1228, U.S.C. Tit. 12, § 36) and the Act of June 16, 1933, c. 89, § 23. The controversy has now flared again with federal savings and loan associations as the fuel.

This Court has established the rule that where it, or any other court, is called upon to strike down a state statute "which would be valid if not superseded by federal action, [it] is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.'" *Kelly* v. *Washington*, 302 U.S. 1, 10. Under the *Missouri* case, the Massachusetts statute would be valid "if not superseded by federal action." The only federal action which could supersede § 37A would be Congressional authorization for branches and Board regulation within that authorization dealing with branches. The only Congressional authorization is contained in the provisions of the Home Owners' Loan Act of 1933 authorizing the Board "under such rules and regulations as it may prescribe, to provide for the . . . operation, and regulation of associations to be known as 'Federal Savings and Loan Associations' . . ." (U.S.C. Tit. 12, § 1464(a), R. 32), supplemented by the references to the "home office" (in § 1464(c), R. 32) and to the "principal office" (in § 1464(i), R. 36) referred to by the Massachusetts court (R. 51) and implemented by the regulations. Granting, without conceding, that these provisions of the Home Owners' Loan Act are consistent

with corporate power to have branch offices of some sort, and that the regulations in §§ 143.16, 145.13, and 145.14 made it explicit that some branches could be had, yet in neither statute nor regulation is there any reference to *where* the branch may be located. The petitioners' submission is that, in view of this significant omission, particularly when considered in the light of the history of Congressional action with reference to branch banking by national banks, it could not be said that there was any "direct and positive" repugnance or conflict because of which the federal and the state action could not "be reconciled or consistently stand together." On the contrary, there is ample room for operation of a reasonable geographical limitation of general application expressive of a settled and intelligent public policy.

The Supreme Judicial Court held that there was no such room, but that the oblique authorization by Congress of any branches in the discretion of the Board so fenced the field that to permit any limitation would raise a "direct and positive" repugnance. This holding, made without reliance on the Board regulations, is in conflict with the decision of this Court in *H. P. Welch Co.* v. *New Hampshire,* 306 U.S. 79. The Supreme Judicial Court did not find or rule that the Massachusetts statute was unreasonable, discriminatory, or subject to any vice other than that, as to federal savings and loan associations, it dealt with a subject matter withdrawn from state sovereign power.

This construction of Congressional intent is of such importance and is based upon such nebulous grounds that it should not be permitted to stand save only following the considered approval of this Court, which, it is submitted, should be withheld.

Once the situation has been reviewed by this Court, the situation *vis à vis* federal savings and loan associations will be like that *vis à vis* the national banks following *First*

National Bank in St. Louis v. *Missouri*, 263 U.S. 640, and if anything further is needed from Congress it can be supplied against a bright and definite background. As matters stand today, the warfare (and it is very real and bitter) between the state chartered institutions and the federal savings and loan associations is being waged in a fog and seriously threatens the existence of our dual system of banking. As in every war, the heaviest losers are the public for whose benefit only both state banks and federal savings and loan associations exist.

Wherefore it is respectfully submitted that this petition should be granted.

RICHARD WAIT,
Attorney for all petitioners other than the Attorney General,

HENRY P. FIELDING,
Assistant Attorney General.

Supreme Court of the United States.

October Term, 1952.

SPRINGFIELD INSTITUTION FOR SAVINGS et al., *Petitioners,*

v.

WORCESTER FEDERAL SAVINGS AND LOAN ASSOCIATION et al., *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

The facts are stated in the petition in support of which this brief is filed.

There is no conflict between the Massachusetts statute and the federal act and regulations.

There is no dispute between the parties that if G.L. (Ter. Ed.) c. 167, § 37A, has any application at all to the respondents, the particular branches in question are established and maintained in violation of that statute and so are not legally established. The statute is one of general application and purports to apply to the respondents. The only ground on which it could be held not to apply would

be that there was a conflict between its requirements and some superseding federal action. This federal action must necessarily have been, if anything, something contained in the Home Owners' Loan Act of 1933 or something contained in the regulations issued by the Board under authority of that act. Our contention is that there is no conflict.

THERE IS NO CONFLICT WITH ANY PROVISION OF THE HOME OWNERS' LOAN ACT OF 1933.

The rule has been stated many times by this Court.

Kelly v. *Washington*, 302 U.S. 1, 10:

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together. *Sinnot* v. *Davenport*, 22 How. 227, 243; *Missouri, K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 623, 624; *Reid* v. *Colorado*, 187 U. S. 137, 148; *Crossman* v. *Lurman*, 192 U. S. 189, 199, 200; *Asbell* v. *Kansas*, 209 U. S. 251, 257, 258; *Missouri Pacific Ry. Co.* v. *Larabee Mills*, 211 U. S. 612, 623; *Savage* v. *Jones*, 225 U. S. 501, 533; *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 293, 294; *Carey* v. *South Dakota*, 250 U. S. 118, 122; *Atchison, T. & S. F. Ry. Co.* v. *Railroad Commission*, 283 U. S. 380, 392, 393; *Mintz* v. *Baldwin*, 289 U. S. 346, 350. *Gilvary* v. *Cuyahoga Valley Ry. Co.*, [292 U.S. 57,] *supra*."

This was followed by a further quotation (at page 11) from *Reid* v. *Colorado*, 187 U.S. 137, bringing forward the

statement contained in *Sinnot* v. *Davenport*, 22 How. 227, that

> "The principle was thus emphatically stated: 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has often been reaffirmed—that, "in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together".' "

The Supreme Judicial Court concluded that there was such a direct conflict and that it was between the action of Congress in delegating authority to the Board to promulgate regulations and the action of the state in passing Section 37A. It did not consider the specific provisions of the regulations actually promulgated and did not deem it necessary to do so. It concluded that it would be inconsistent "to assert that there is no conflict between §37A and the power of the board . . . and, at the same time, to insist that that power is so circumscribed by §37A as to render nugatory the approval of a branch in a municipality which is not within fifteen miles of the city or town where the principal banking office is located" (R. 52). Whatever may be the result once the regulations are considered, this conclusion that there was a conflict and inconsistency, irrespective of the provisions of the regulations, was clearly wrong.

H. P. Welch Co. v. *New Hampshire*, 306 U.S. 79.

In that case, Congress gave power to the Interstate Commerce Commission to make regulations which would supersede the state law in question. It was held that this did not render inapplicable the prohibition of the existing state law which the defendant had violated after the authorization from Congress to the Commission but before any action by the Commission actually superseding the state statute. It, consequently, is clear in the present case that even if the provisions of the Home Owners' Loan Act of 1933 authorized the Board to promulgate regulations which would conflict with Section 37A, still the prohibition of Section 37A would not be superseded until the conflicting regulation was promulgated. We, consequently, are thrown back on the provisions of the regulations in order to determine whether there is any conflict.

THERE IS NO CONFLICT WITH THE ACT AS IMPLEMENTED BY THE REGULATIONS PROMULGATED BY THE BOARD.

The regulations do not mention geography at all. They do provide that a federal savings and loan association may have branch offices having first obtained the *ad hoc* approval of the Board as to each. The regulations clearly assume power in an association to have branches, but so does Section 37A. Section 37A could never come into operation if the maintenance of a branch was *ultra vires* the association.

Since both the Board regulations and the Massachusetts statute rest upon the common ground that some branches are permissible, the conflict, if any, must be between the fifteen-mile limit expressed by Massachusetts and the Board's silence as to geography. In other words, the question comes down to whether the failure of the Board to define the area within which branches may be maintained amounts to an affirmative and authoritative pronouncement that the Board may determine as to each association

upon each successive application for approval within what area that particular local institution may act. This amounts to whether the Board is given authority itself to define the "community to be served" by each local association irrespective of the circumstances of the state of which that community is a part and in direct violation of the established public policy of the state.

In answering that question, two considerations must be borne in mind. The first is that Congress did not mention branches at all in the act and, consequently, the asserted grant of power to the Board to authorize branches must be implicit in the grant of power "under such rules and regulations as it may prescribe, to provide for the . . . operation . . . of . . . 'Federal Savings and Loan Associations' . . ." (U.S.C. Tit. 12, § 1464(a)). The second is that Congress made it perfectly clear that the "Federal Savings and Loan Associations," for the operation of which the Board was to provide, were to be strictly *local* institutions. There was no grant of power to the Board through regulation to make them anything else. And whatever it may have said in reports or done through *ad hoc* approvals, in its actual regulations the Board never went beyond authorizing branches in an undefined territory.

No contention has been made, and there is room for none, that the Massachusetts prohibition against maintenance of branches more than fifteen miles from the town in which the principal office is situated is in and of itself unreasonable or an improper exercise of the police power, provided the association to which it applies is amenable to application of the police power. The prohibition has applied to Massachusetts savings banks since 1908 and those banks have lived under it quite happily ever since. Clearly, to the extent that Massachusetts has effective police power, the statute is a reasonable and valid exercise of that power and a reasonable definition of the territory which is available to be served by a local institution.

The maintenance of branches by a bank is no more than one item in the method of transacting its business. There can be no doubt that the police power of a state extends to some regulation of the business of banking and it is equally clear that federally chartered institutions conduct more items of their business through the sanction of the state law than they do through the sanction of the federal law. Granted that their corporate power stems from the paramount federal source, still the methods by which they shall exert that power in carrying on their business depend to a very large extent upon the provisions of the state law. For example, the laws relating to negotiable instruments are of immediate and hourly concern to federally chartered institutions. So are laws governing interest rates, terms which may be included in mortgages and other forms of security, and the form and method of foreclosure. Yet all these laws are state rather than federal. So, also, federally chartered institutions are subject to state laws governing wages and hours of service of employees, workmen's compensation, the construction and operation of the bank premises, zoning laws and the like. A state mortgage moratorium act would apply to a federally chartered institution. Likewise, in acting in fiduciary capacities, the state laws governing their appointment as fiduciaries and the fashion in which they discharge their fiduciary functions are controlling. The mere fact that the institutions are brought into being under the paramount authority of the United States does not exempt them from all of these manifold applications of the state law.

First National Bank in St. Louis v. *Missouri*, 263 U.S. 640, 656 (1924):

"National banks are brought into existence under federal legislation, are instrumentalities of the Fed-

eral Government and are necessarily subject to the paramount authority of the United States. Nevertheless, national banks are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States. *National Bank* v. *Commonwealth,* 9 Wall. 353, 362; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283."

The pertinent regulation itself contemplates that some state laws will apply to branches. The definition given in § 143.16(b) is:

> "A branch office of a Federal association is a *legally* established place of business of the association authorized by the board of directors, at which . . . ," etc. (R. 45, emphasis supplied.)

"Legally established" is the equivalent of "lawfully established" and the law which would determine the legality or illegality would necessarily include state law. For example, under local zoning ordinances, it is unlawful for a bank to establish and maintain a place of business in a neighbourhood zoned for strictly residential purposes. A branch of a federal association located in such a zone would not be "legally established" and would not meet the Board's own definition, yet it would be the application of the state police power which would prevent it.

The manifest purpose of the Massachusetts statute is to localize the institutions to which it applies. In many states a radius of fifteen miles from the town of the home office would include a very small community. This is not so in a thickly settled state like Massachusetts. A short experiment with a pair of compasses and a map of Massachusetts

discloses that there is no town in the Commonwealth more than fifteen miles distant from another town of equal or greater size. The fifteen-mile limitation does not represent an arbitrary figure but a reasonable one based upon the facts as they exist in Massachusetts. A localization of an institution, state or federal, within such an area in Massachusetts tends to make it precisely the sort of institution which Congress envisaged when it passed the Home Owners' Loan Act of 1933.

The entire object of the act was as stated in Section 5 (U.S.C. Tit. 12, § 1464(a), R. 32) "to provide *local* mutual thrift institutions" (emphasis supplied). The Congressional intent was to provide "home-town institutions" fitted into the existing local terrain. Thus, in chartering these local institutions, the Board was directed to give "primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States" (Section 1464(a)). So, also, the Board was directed not to grant a charter unless it concluded that "a necessity exists for such an institution in the community to be served, . . . nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions" (Section 1464(e)). The use of the word "community" in conjunction with the word "local" in this section is significant. Whatever might be the situation elsewhere, no community in Massachusetts could fail to be included within the fifteen-mile radius which we are considering. Further, the Act provides that "no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations . . . greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions" (Section 1464(h)). This is of interest not only to show Congressional intent to place the new associations on a parity with existing state-char-

tered institutions but to show the reading intended for the word "local." In the enumeration of the taxing authorities subjected to this prohibition a descending order of size is used, and the smallest is the "*local* taxing authority" which is placed below the municipal. Finally, there is the provision of Section 6 of the Act (12 U.S.C. sec. 1465) by which money was appropriated for the assistance of thrift institutions to "be used impartially in the promotion and development of local thrift and home-financing institutions whether State or Federally chartered."

In other words, the public policy announced by Congress in 1933 with reference to the new savings and loan associations was the same public policy which Massachusetts had established with reference to its similar thrift institutions (savings banks and cooperative banks) a quarter of a century earlier. Both kinds of institutions were to be local, and far from hampering Congressional policy, the Massachusetts statutes implement it within the local terrain.

THE HISTORY OF CONGRESSIONAL ACTION ON BRANCH BANKING IS SIGNIFICANT.

In the Home Owners' Loan Act of 1933, Congress said nothing about branches unless the references to "home office" in § 5(c) and to "principal offiee" in § 5(i) imply branch power (12 U.S.C. sec. 1464). It had said nothing about branches in the National Bank Act prior to 1927. Having said nothing to authorize national banks to have branches, this Court, in 1924, held that that power had not been granted to them.

> *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640.

In 1927, Congress passed the McFadden Act (44 Stat. 1228; U.S.C. Tit. 12, § 36), which provided:

"A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time *permitted* to State banks by the law of the State in question." (Emphasis supplied.)

This left the ultimate decision on policy regarding branch banking to the states. Six years later the matter again came before Congress and an attempt was made to induce Congress to amend the statute to provide for branches of national banks without regard to state policy. This attempt failed and instead Congress amended the statute to make the state control more explicit still. This was by the Act of June 16, 1933, c. 89, § 23, which provided:

"(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time *expressly authorized* to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time *authorized* to State banks by the statute law of the State in question *by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State* on State banks." (Emphasis supplied.)

That act was passed three days after the Home Owners' Loan Act.

It is ridiculous to suggest that Congress intended on June 13, 1933 to launch a policy of branch banking for the new savings and loan associations without regard to state policy when, on June 16, 1933, it took precisely the opposite course for national banks. It is true that savings and loan associations differ from national banks but the competitive position of each *vis à vis* state chartered similar institutions is substantially the same. Certainly a state court should not infer a radical difference in Congressional policy with reference to the two in the absence of any statement of that policy. The action of Congress on June 16 following its silence on June 13 makes the inference clearly wrong.

The situation merits review by this Court.

We recognize that a showing that a lower court has decided a case wrong will not, without more, move this Court to grant certiorari. Here, there is much more. The question of whether the Board may change the savings and loan associations which Congress had said should be local into something quite different is certainly a federal question of substance within the meaning of Rule 38, paragraph 5(a). The balance and health of the nationwide dual banking system will be radically affected by the answer.

The specific question has not been determined by this Court as yet. It was not presented in any of the five cases dealing with federal savings and loan associations which the Court has had occasion to consider. Those cases are:

> *Hopkins Federal Savings & Loan Assn.* v. *Cleary,* 296 U.S. 315:

That case, which the Court took on certiorari to the Wisconsin Supreme Court, dealt with conversion of a state association into a federal one. The Court held unconstitu-

tional the then provisions of § 5(i) of the act, which permitted conversion without the consent of the state which had granted the charter. It was stated in the opinion (at p. 332):

> "To determine the meaning and, if need be, the validity of an important federal statute, writs of certiorari were granted by this court."

First Federal Savings & Loan Assn. v. *Loomis*, 97 F. (2d) 831:

In that case, the Circuit Court of Appeals for the Seventh Circuit had decided that the plaintiff association could enjoin the appropriate state officers, by suit in the federal District Court, from seeking through state court proceedings in the nature of *quo warranto* to prevent its doing business in Wisconsin. This directly involved the power of Congress to charter the plaintiff but the only specific charter power under consideration was that to do business in Wisconsin without a license from that state. This Court granted certiorari, 305 U.S. 564, but, before hearing, the case was dismissed on motion of counsel for the petitioners. 305 U.S. 666 (*sub nom. Martin* v. *First Federal Savings & Loan Assn.*).

Commissioner of Corporations & Taxation v. *Flaherty*, 306 Mass. 461:

That case held invalid a tax assessed by the commissioner under the state income tax statute upon dividends from a share account in one of the present respondents. The ground of decision was that similar dividends paid by state cooperative banks were specifically exempted and, consequently, to construe the general language of the taxing statute to include the association's dividends would be

discriminatory. This Court denied a petition for certiorari. 312 U.S. 680.

Fahey v. *Mallonee,* 332 U.S. 245:

That case came before the Court on appeal from a three-judge District Court. In it a shareholder of a savings and loan association by derivative suit sought to attack the appointment of a conservator for the association. The suit was dismissed. The case concerned rights within the association and had nothing to do with its relation toward any state.

North Arlington National Bank v. *Kearney Federal Savings & Loan Assn.,* 187 F. (2d) 564:

That case did not involve branches. The plaintiff National Bank sought to enjoin the maintenance of a branch as unfair competition on the ground that the act did not authorize the Board to promulgate regulations providing for any branches and, consequently, that it was *ultra vires* the Association to maintain the branch in question. The Court of Appeals for the Third Circuit held it did have authority and this Court denied certiorari. 342 U.S. 816. No state law fixing areas for branches was involved.

The present petition, therefore, presents a novel point. Its importance, however, is indicated by the large amount of litigation which the savings and loan associations have generated. Those cases also show the bitterness which exists in the relationship between the associations and their state chartered competitors and the uncertainty which exists as to what each can do. Both of those factors can scarcely fail to have a detrimental effect. A clear and final decision of this Court on this much mooted question

of branches would fill a serious public need. The present record on this class bill so presents the point that the Court is in the position to make such a decision and to satisfy that need.

Further, the decision of the Supreme Judicial Court is not in accord with the applicable decisions of this Court. The asserted conflict between federal and state power on which the decision was announced in the opinion could not exist under the decision of this Court in *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79. Once the regulations actually promulgated and the power to establish branches granted by them are considered, it is apparent that there is no real conflict at all, let alone a direct and positive one, and, consequently, the holding that the federal action superseded the state is contrary to the many decisions of this Court of which *Kelly* v. *Washington*, 302 U.S. 1, is representative.

The matter is of the gravest moment to the Commonwealth of Massachusetts and to all state chartered thrift institutions. We earnestly request the Court to grant the petition.

Respectfully submitted,

RICHARD WAIT,
Attorney for the petitioning savings banks,

HENRY P. FIELDING,
Assistant Attorney General.

Of Counsel:
RUTHERFORD E. SMITH,
Of Boston.

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In the Supreme Court of the United States

October Term, 1952

No. 357

SPRINGFIELD INSTITUTION FOR SAVINGS, ET AL.

v.

WORCESTER FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

(Joint Appendix, p. 1, line 10, infra)

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported in Mass. Adv. Sh. (1952) 743 and 107 N.E. 2d 315 and appears at pages 49 to 53 of the Record.

JURISDICTION

The final decree sought to be reversed was entered on August 1, 1952 (R. 56) pursuant to rescript of July 3, 1952 (R. 54). The petition for certiorari was filed on September 30, 1952. The jurisdiction of this court is invoked under 28 U. S. C. §1257 (3), 62 Stat. 929.

QUESTION PRESENTED

Did Congress intend by the Home Owners' Loan Act of 1933 to establish a national system of uniformly regulated federal savings and loan associations governed by the Home Loan Bank Board whose regulations in regard to the establishment and location of branch offices of such institutions would be supreme over inconsistent state regulation?

STATUTES AND REGULATIONS INVOLVED

The statutes involved are the Home Owners' Loan Act of 1933, 12 U. S. C. §1461, 48 Stat. 128, *et seq.*, as amended (R. 32-39, Ex. A); Mass. G. L. (Ter. Ed.) c. 168, §25, as amended (R. 40, Ex. B); and Mass. G. L. (Ter. Ed.) c. 167, §37A, as inserted by Mass. St. 1949, c. 640 (R. 47, Ex. F). The regulations are those of the Home Loan Bank Board, 24 Code Fed. Regs., Chapter 1, subchapter C (Supp. 1949), pertinent portions of which are set forth in Ex. E (R. 41-46).

FACTS

Each respondent is a federal savings and loan association chartered by the Home Loan Bank Board (R. 24) pursuant to the provisions of the Home Owners' Loan Act of 1933, 12 U. S. C. §1464, 48 Stat. 132, *et. seq.*, as amended (R. 32-39), has its principal or home office in Massachusetts (R. 24) and carries on a business similar to that of petitioners and other Massachusetts savings banks (R. 25-26).

On September 29, 1950 the Home Loan Bank Board, pursuant to its regulations (R. 41-47) authorized by and promulgated under 12 U. S. C. §1464, 48 Stat. 132, as amended (R. 32), and in accordance with its previously established policy (R. 26-27), gave its written approval

for the establishment by each of the respondents of a branch office in the City of Springfield, Massachusetts (R. 27). As Springfield is more than fifteen miles from the location of the principal or home office of either respondent (R. 26, 27), these branches have been established and operated in contravention of the apparent prohibition of Mass. G. L. (Ter. Ed.) c. 167, §37A (R. 47, Ex. F), which purports to subject federal instrumentalities[1] to the same fifteen-mile restrictions as to branch offices which are applicable to savings banks created under the laws of Massachusetts and to the requirement of obtaining the written permission of the State Commissioner of Banks for the establishment of branch offices (R. 40, Ex. B; R. 41, Ex. D).

In the Supreme Judicial Court for Suffolk County the petitioners and the Attorney General of Massachusetts sought a declaration that the maintenance and operation of these branch offices were unlawful (R. 2-12, 19-21). The case was reserved and reported without decision (R. 1) on the pleadings and a statement of agreed facts (R. 23-31) for the determination of the Full Court for the Commonwealth, which rendered the opinion and issued the rescript to which reference has previously been made.

ARGUMENT

The language of the Home Owners' Loan Act of 1933, when studied in the light of the administrative and legislative interpretations thereof, demonstrates that the court below was right in holding that there is a conflict between Mass. G. L. (Ter. Ed.) c. 167, §37A and the Congressional intention of establishing a uniform *national* system of

[1] It has uniformly been held that federal savings and loan associations are instrumentalities of the federal government. *Federal Savings & Loan Insurance Corp.* v. *Kearney Trust Co.*, 151 F. 2d 720, 725 (C. A. 8th Cir.); *Commissioner of Corporations and Taxation* v. *Flaherty*, 306 Mass. 461, 462-63, cert. denied, 312 U. S. 680; *First Federal Savings & Loan Ass'n.* v. *Donaher*, 128 Conn. 78, 93-99; *State* v. *Minnesota Federal Savings & Loan Ass'n*, 218 Minn. 229, 238.

federal savings and loan associations and branch offices therefor subject to the detailed and exclusive regulation of the Home Loan Bank Board. The decision of the Massachusetts Court is in accord with all the applicable decisions under the Act, and the question presented by the petition is not one of general interest or importance.

1. *The Language of the Home Owners' Loan Act of 1933.*

The Act is "of the type which states a policy, provides for the project under consideration, lays down some general rules and prohibitions and leaves details to the Board. . . ." *North Arlington National Bank* v. *Kearney Federal Savings & Loan Ass'n*, 187 F. 2d 564, 565 (C. A. 3d Cir.), cert. denied, 342 U. S. 816. When Congress employed the words "home office" (§1464 (c), 61 Stat. 786 and §1464 (i), 62 Stat. 1239) and "principal office" (§1464 (i)), it in effect said that both the establishment and location of branch offices were "subordinate arrangements" to be regulated by the Board. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 424-25. It did not require the Board to conform to particular state branch banking policies in its "selection of localities for establishment" (§1464 (e), 48 Stat. 133; R. 34) but ordered it to give "primary consideration to the best practices of local mutual thrift and home financing institutions *in the United States*" (§1464 (a), 48 Stat. 132; R. 32 (emphasis supplied)). *North Arlington* case, *supra*, pages 565-66. Congress intended that the Board should adopt a uniform *national* policy based on a judicious selection of local practices but not restricted by the limitations imposed by any particular locality. As the Court put it in *California* v. *Coast Federal Savings & Loan Ass'n*, 98 F. Supp. 311, 319 (S. D. Cal.), construing this same statute on an analogous point:

> "The Congressional mandate for uniformity would be destroyed if these associations were subject to

federal control, plus concurrent state control, which latter control might vary in every one of the forty-eight states."

2. *Administrative Construction of the Act.*

The regulations of the Home Loan Bank Board and the action taken thereunder have made actual the potential conflict between state and federal law which arose at the moment when Congress created a system of savings and loan associations under national rather than local supervision. In accordance with the mandate of §1464 (a), 48 Stat. 132, the Board has construed the Act as requiring a national, uniform system of regulations concerning branch offices which should not be permitted to vary in accordance with the differing restrictions of the several states in which the associations are located.

Section 145.14 of the Board's regulations (R. 46-47, Ex. E) comprehensively sets forth the considerations to be taken into account in approving the establishment of a branch office: the need for the office; the functions to be performed; the personnel and office facilities to be provided; and the estimated annual volume of business, income, and expenses of the office. The Board did not regard distance from the home office, without regard to the other listed factors, as of independent and overriding significance. Nor can its failure to do so be explained by a lack of concern with the proper geographical scope of a federal association's activities. Section 145.6-6 (R. 46), in accordance with §1464 (c) of the Act (R. 32-33), draws a circle fifty miles in radius around the home office of each association and declares the area thus enclosed to be the association's "regular lending area." The Board has not circumscribed more narrowly the area within which branch offices may be established, presumably because it has not deemed it advisable to do so. Indeed, the impossibility of reading the regulations as contemplating accommodation

to the varying and conflicting restrictions on branches of similar institutions imposed by differing state, county and municipal regulations is confirmed by the fact that twenty-four of the one hundred thirty-one branch offices approved by the Board are in states whose banking policies forbid branch offices (R. 26).[2]

The conflict between the local policy of the Massachusetts statute and the authority vested by Congress in the Board is dramatized by related provisions of Massachusetts law. Mass. G. L. (Ter. Ed.) c. 168, §25 (R. 40, Ex. B) not only provides a fifteen-mile limitation on the location of branch offices but also empowers the Massachusetts Commissioner of Banks to approve additional regulations in regard to the maintenance and establishment of branch offices. If the statute in question (R. 47, Ex. F) were upheld, then *every* regulation of the Board in regard to branch offices would be subject to frustration at the discretion of the Massachusetts Commissioner.

3. *Congressional Construction of the Act.*

Congress has amended the Home Owners' Loan Act of 1933 five times without imposing any additional restrictions on the Home Loan Bank Board's uniform national policy of branch offices for federal savings and loan associations.[3] During this same period repeated attempts to subject the Board to the shackles of conflicting state branch banking policies have failed of adoption. *North Arlington National Bank* case, *supra*, pp. 566-67; H. R. 4736 and H. R. 5900, 81st Cong. See S. 2564 and Sen. Rep. No. 1455, 82d Cong., 2d Sess. Congress must thus be taken as having approved

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[2] See Colo. Stats. Ann. c. 18, §61 (1935), as amended; Fla. Stats. §653.01 (1949); Kans. Gen. Stats. c. 9-1111 (1949); Minn. Stats. §48.32 (1949); Mo. Rev. Stats. §362.105 (1949); Texas Const. Art. XVI, §16; Vernon's Texas Stats. Art. 432-903 (1948); W. Va. Code §3131 (1949).

[3] 48 Stat. 645, 646; 49 Stat. 297; 53 Stat. 1402; 61 Stat. 786; 62 Stat. 1239.

the Board's determination that it shall not be bound by the specific policies of the particular states. *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345; *Zellerbach Co.* v. *Helvering*, 293 U. S. 172, 179-190; *Hasset* v. *Welch*, 303 U. S. 303, 312; *Fondren* v. *Commissioner*, 324 U. S. 18, 29-30.

Accordingly, it is anomalous to suggest that the Congressional policy in regard to branch offices for federal savings and loan associations is in any way evidenced by the legislation dealing wth national banks. On the contrary, Congress deliberately established a different relationship between national banks and state regulation from that between federal savings and loan associations and state regulation. Only thus is it possible to explain the fact that three days after the original enactment of the Home Owners' Loan Act of 1933 (48 Stat. 132) Congress again amended the National Bank Act of 1864 by further specifying the conditions under which national banking associations might establish and operate new branches in harmony with state laws affecting similar state banking associations (12 U. S. C. §36, 48 Stat. 189).

The present case is merely an illustration of the rule that Congress need not accommodate its legislation to such conflicting and dissimilar state banking laws as are typified by Mass. G. L. (Ter. Ed.) c. 167, §37A. *Florida* v. *Mellon*, 273 U. S. 12, 17. The operation of the Supremacy Clause is not confined to instances where the express language of the federal statute conflicts with state law (as in *Kelly* v. *Washington*, 302 U. S. 1) but applies wherever the execution of a Congressional purpose will be impeded by state interference. *Hines* v. *Davidowitz*, 312 U. S. 52, 67; *Hill* v. *Florida*, 325 U. S. 538, 542. The state statute here in question must yield because it attempts to impede the purposes of Congress "to provide local mutual thrift institutions in which people may invest their funds and . . . to provide for the financing of homes. . . . " (§1464(a), 48 Stat. 132).

The decision below is in accord with all the applicable decisions under the Home Owners' Loan Act. In *North Arlington National Bank* v. *Kearney Federal Savings & Loan Ass'n*, 187 F. 2d 564 (C. A. 3d Cir.), it was unequivocally held that a state's policy forbidding branch offices of building and loan associations did not deprive the Board of authority to approve the establishment of a branch office for a federal savings and loan association. This Court denied certiorari, 342 U. S. 816. Similarly, in *California* v. *Coast Federal Savings & Loan Ass'n, supra*, it was held that a state was powerless to regulate the practices of a federal savings and loan association where the Home Loan Bank Board had issued its own regulations on the subject. The case of *First National Bank in St. Louis* v. *Missouri*, 263 U. S. 640, on which the petitioners rely so heavily, is inapposite. It merely presents a facet of the contrasting history of branch offices for national banks referred to above. The restrictive language of the National Bank Act as it then stood dictated administrative, legislative and judicial interpretations different from those in the present case.

The question presented by this case is not one of general interest or importance because in none of the states in which the Board has approved branch offices "is there a statute which in its entire context is equivalent to G. L. (Ter. Ed.) c. 167, §37A" (R. 26). The opinion of the court below is correct and has provided a definitive answer in the only area in which the problem is likely to arise. Indeed, the whole question may be rendered moot by Congressional action in accordance with Sen. Rep. No. 1455, 82d Con., 2d Sess., reporting favorably on S. 2564 of 1952, which would expressly validate the branch offices here in question.

CONCLUSION

The decision of the court below was right, and the petition should be denied.

Respectfully submitted,

CHARLES B. RUGG
KLEBER A. CAMPBELL, JR.
DONALD R. GRANT
Counsel for Worcester Federal Savings and Loan Association

JOHN I. ROBINSON
Counsel for Union Federal Savings and Loan Association

ROPES, GRAY, BEST, COOLIDGE & RUGG
Of Counsel

October, 1952

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

No. 367.

SPRINGFIELD INSTITUTION FOR SAVINGS *et al.*,
Petitioners,

v.

WORCESTER FEDERAL SAVINGS AND LOAN ASSOCIATION *et al.*,
Respondents.

BRIEF *AMICI CURIAE* ON BEHALF OF NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

FRED N. OLIVER,
M. F. MCCARTHY,
110 East 42nd Street,
New York 17, N. Y.

Dated October 8, 1952.

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BRIEF *AMICI CURIAE* ON BEHALF OF NATIONAL ASSOCIATION OF MUTUAL SAVINGS BANKS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Statement.

The undersigned members of the bar of this Court file this brief as *amici curiae,* pursuant to Rule 27(9)(b), on behalf of the National Association of Mutual Savings Banks, in support of the petition for a writ of certiorari. There have been filed with the Clerk of this Court the written consents of all parties who have entered appearances here in this case.

The question presented in this case is whether a state may constitutionally establish by statute a uniform policy as to location of branches and deposits, for institutions within its borders doing a banking business or a business similar thereto, where with respect to federal savings and

loan associations Congress has prescribed no policy inconsistent therewith. The court below has held that by virtue of the Constitution of the United States, the Commonwealth of Massachusetts is prohibited from making such a policy applicable to federal savings and loan associations incorporated under the Home Owners Loan Act of 1933 (48 Stat. 128, 12 U. S. C. Sec. 1461 ff.) and doing business in the Commonwealth. It held that the statute of the Commonwealth establishing such a uniform policy was in conflict with the Home Owners Loan Act of 1933, authorizing the Home Loan Bank Board to make regulations governing the operations of such associations.

The National Association of Mutual Savings Banks is an unincorporated association with its principal office in New York City. Its members are 529 mutual savings banks, located in 17 states, and having approximately $20 billion dollars of deposits held by 20 million depositors. They are non-stock, non-profit institutions, managed by boards of trustees. Their purpose is to promote thrift among persons of limited means, and they effectuate it by receiving savings and investing them, principally in real estate mortgages and government bonds. All are state-chartered and state-supervised institutions, and as such they have a vital concern with questions of the constitutional extent of state regulatory power.

For a statement of the facts of this case and the statutory jurisdiction of this Court, we respectfully refer the Court to the petition.

ARGUMENT.

1. The question of federal law presented is of great public importance.

No business has been regarded for a longer period as a proper subject for the state's concern in protecting its citizens, by regulation and supervision thereof, than has the business of taking the citizen's money and lending it to others. The decision below restricts the power of the states in this regard, taking from them a power which, as will be more fully pointed out below, they had hitherto been thought to possess. Consequently, review by this Court would appear to be urgently required.

The banking history of this country reveals a division of opinion and a long record of controversy, regarding the merits of branch banking and unit banking. Some states, following the example of England and Canada, permit widespread branch systems. Others, with the traditional American fear of monopoly, prohibit branches. Others adopt compromise systems.

Were federally chartered institutions to have a right to unlimited branches solely by virtue of their federal chartering, or even a right to branches limited only by the discretion of the chartering officer, state policy on the question would not long survive. Before the instant decision, however, it had been established that branch policy was a matter reserved to the states, and for over a century Congress had carefully abstained from imposing any uniform policy upon them. Andrew Jackson overthrew the second Bank of the United States and its branches; national banks made few or no attempts to operate branches until after the war of 1914-1918. When after that war some national banks embarked on a branch policy, in defiance of the policy of

the state in which they operated, this Court struck down the innovation (*First National Bank of St. Louis* v. *Missouri*, 263 U. S. 640 (1924)). Its decision was emphasized by Congressional action in the McFadden Act of 1927, which amended the National Banking Act to permit branches, but on a basis limited to the privileges enjoyed by competing state institutions in the state of domicile (44 Stat. 1228; 12 U. S. C. sec. 36).

Five years later Congress rewrote the applicable statute, repudiating a proposal to depart from the principle of equality with state institutions' privileges and imposing even further limitations on the establishment of branches (Section 23 of the Banking Act of 1933, 48 Stat. 189, amending Rev. Stat. 5155, 12 U. S. C. sec. 36). An account of the watchful attitude toward bank branches manifested by the Senate is set forth in *Rushton* v. *Michigan National Bank*, 298 Mich. 417, 299 N. W. 129, 136 A. L. R. 458 (1941).

Concurrently, Congress created a new type of Federal credit institution, the Federal Savings and Loan Association, in the Home Owners Loan Act of 1933 (passed three days before the amendment to the McFadden Act). Nothing was said in that statute about branches for these institutions. In 1948, however, the Home Loan Bank Board proclaimed that it

> "has formed the opinion that to the extent that Congress empowered it to charter Federal associations, it likewise, under the law and for the same reasons and with the same general limitations, gave the Board authority to sanction and approve the creation of branches. * * * It does not accept the thesis that its judgments or authority are bound by State laws or by the policies of State supervisory authorities with respect to the creation and approval of branch organizations" (Report of the Home Loan Bank Board for year ending December 31, 1948, p. 38).

The establishment of branches by the Board prior to 1948, offered no challenge to state policy involved, to our knowledge. Most or all of the branches approved were in locations where state thrift institutions would have been permitted to have branches. But as pointed out above, the Board in 1948 announced its intention to disregard state policy; and in the case at bar it has carried that policy to its logical extreme by approving respondents' branches in the face of a statute of the Commonwealth of Massachusetts directly prohibiting them. The court below sustained the challenge issued by the Federal agency to the people of the Commonwealth, and struck down the statute, or at least nullified it with respect to Federal savings and loan associations. We submit that so direct a clash between the people of a sovereign state and the administrators of a Federal agency should be resolved by the Supreme Court of the United States.

II. The issue presented has been decided by the Court below in a manner probably in conflict with an applicable decision of this Court.

The case in effect presents three questions which are individually and collectively of great general importance: first, has the Home Loan Bank Board power to authorize, or do Federal savings and loan associations have power to operate, branches; second, if they have such power, does the power extend to the authorization and operation of branches where state statutes forbid such operation; and third, if power to authorize operation of branches in locations where they are forbidden by state law does in fact exist, has the presently existing regulation of the Board foreclosed the states from any exercise of their traditional policy in this field?

The court below stated that the Home Owners' Loan Act does not use the word "branch". It rested its decision, however, on an implication, finding that the statutory power of the Home Loan Bank Board to prescribe rules and regulations for federal savings and loan associations, and in issuing charters to consider the best practices of thrift institutions throughout the United States, constituted "express authorization" for the Board to approve the operation of branches. We do not see how such an implication can constitute "express" authorization.

In *First National Bank of St. Louis* v. *Missouri*, 263 U. S. 640 (1924), it was contended that the establishment of a branch is the exercise of an incidental power conferred by the statutory provision granting "all such incidental power as shall be necessary to carry on the business of banking" (Rev. Stat. sec. 5136). This Court held however, that the power did not exist, saying (at p. 658):

> "The mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of this provision."

The court below was dealing with different language, a statutory power for a supervisory authority to make regulations rather than a statutory power in the institutions to carry on business. Nevertheless, the principle that branch powers must be specifically set forth and cannot be implied would seem to have been firmly established by the *First National Bank* case, and lightly disregarded by the court below. Considering the history of the long controversy above referred to between branch and unit banking, the disregard of the *First National Bank* case is even more inexcusable.

Also, Congress has very clearly, in the McFadden Act of 1927, and in the Banking Act of 1933, cited above, shown that it agrees with the principle of the *First National Bank* case that branch policy for Federal credit institutions is something which it will prescribe itself, with precision and with due regard to the policies of the states in which the institutions operate. The Banking Act of 1933 was passed on June 16, 1933, and the Home Owners' Loan Act on June 13, 1933. The court below has held in effect that the delicate adjustment between state and federal power in the regulation of credit institutions worked out by this Court and Congress, and expressed so carefully in the Banking Act of 1933, was being simultaneously ignored by Congress in the Home Owners' Loan Act of 1933, although that Act contains no reference whatever to branches.

The court was not therefore justified in implying, from a general statutory power to make regulations, a power to authorize the operation of branches and to authorize such operation notwithstanding state law and policy on the subject. And even if it was justified in implying the existence of such power, it was not justified in the further implication that the power had been exercised so as to nullify the law of Massachusetts.

This court has stated that no conflict will be held to exist between a federal statute and a state statute, nor between a federal regulation and a state statute, unless the conflict is clear and unavoidable. *Kelly* v. *Washington,* 302 U. S. 1 (1939). In this case the regulation made no effort to prescribe standards of location for savings and loan association branches, so that under the well-established rule, the historic jurisdiction of the state to prescribe such standards was undisturbed even if the regulation was validly issued. The court below proceeded by implication to validate a regulation which overturned the rule of the *Missouri* case and the

established Congressional policy on branches of financial institutions; it then proceeded by further implication to sanction action, viz., the establishment with Home Loan Bank Board approval of the two branches in question, which went beyond the terms of the regulation to nullify the legislatively expressed policy of the Commonwealth of Massachusetts. Such use of implication contrary to two rules of law established by this Court, producing the upsetting effect on established relations of state and federal authority which we have previously discussed, should be reviewed and reversed by this court.

Conclusion.

For the reasons set forth above, we request that this Court issue its writ of certiorari directed to the Supreme Judicial Court of the Commonwealth of Massachusetts, to review the record and the issues in this case.

Respectfully submitted,

Fred N. Oliver,
M. F. McCarthy,
110 East 42nd Street,
New York 17, N. Y.

Dated: October 8, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952.

No. 367.

SPRINGFIELD INSTITUTION FOR SAVINGS, *et alii*,
Petitioners,

v.

WORCESTER FEDERAL SAVINGS AND LOAN ASSOCIATION, *et. al.*,

Respondents.

BRIEF OF THE MASSACHUSETTS BANKING DEPARTMENT AS *AMICUS CURIAE*.

DEPARTMENT OF BANKS,
COMMONWEALTH OF MASSACHUSETTS.

By TIMOTHY J. DONOVAN,
Commissioner.

JOHN F. CLAIR,
Attorney.

Dated October 30, 1952.

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BRIEF OF THE MASSACHUSETTS BANKING DEPARTMENT AS *AMICUS CURIAE.*

Interest of the Massachusetts Banking Department.

The Massachusetts Banking Department, through the undersigned members of the bar of this Court, files this brief as *Amicus Curiae*, pursuant to Rule 27 (9) (b), in support of the petition for a writ of certiorari filed by the petitioners in this case. The Clerk of this honorable Court has received the written assents to the filing of this brief from all of the parties who have filed appearances herein.

The question presented to the Court is whether the Commonwealth of Massachusetts by the enactment of § 37 A, c. 167, G. L., as inserted by St. 1949, c. 640, has acted properly within its police power to determine the distance from the

main banking house at which a banking organization may establish a branch, when it appears that there is no conflict between this statute and any act of Congress applicable thereto.

The Supreme Judicial Court of Massachusetts has held, in this case, that said § 37A does not apply to federal savings and loan associations doing business within the borders of the Commonwealth of Massachusetts in that the Home Owners' Loan Act of 1933, as amended, gives to the Home Loan Bank Board the power to authorize the establishment of branches of its supervised institutions and that this power includes the right to authorize the establishment of such branches despite the state law governing similarly chartered state thrift and home-financing institutions. In Massachusetts such institutions are known as savings banks and co-operative banks.

For a more complete statement of the facts in the case before the Court, as well as its statutory jurisdiction, we respectfully refer the Court to the petition.

Argument.

Under the provisions of the Home Owners' Loan Act of 1933, as amended, the Home Loan Bank Board was authorized to charter federal savings and loan associations, 12 U. S. C., § 1464 (a), "in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes . . ." and the Board was further authorized to prescribe rules and regulations ". . . to provide for the organization, incorporation, examination, operation and regulation . . ." of federal savings and loan associations. Acting under the power granted to it to prescribe rules and regulations, the Board has issued one pertaining to branch offices of federal savings and loan associations, § 145.14, *Manual of Rules and Regulations for*

Federal Savings and Loan System. Insofar as material, this regulation reads as follows:

> "No Federal association may establish or maintain a branch office without the prior written approval of the Board. Each application by a Federal association for permission to establish or maintain a branch office shall state the need for such branch office; the functions to be performed; the personnel and office facilities to be provided; . . ."

The Massachusetts General Court has enacted a statute pertaining to branches of all financial institutions doing business within the confines of its jurisdiction, § 37A, c. 167, G. L., as inserted by St. 1949, c. 640. This statute states in part:

> "No association, corporation, . . . organized or operating under laws other than the laws of this Commonwealth . . . shall establish or maintain any branch . . . in this commonwealth . . . except in accordance with the same restrictions and limitations to branches applicable to similar institutions organized or operating under the laws of this commonwealth."

Assuming, without admitting, that § 145.14 is a proper exercise of the administrative function of the Home Loan Bank Board, in promulgating this regulation the Board, however, did not provide a standard with reference to distance in order to govern a federal savings and loan association in the consideration of a location of a new branch office. In this Commonwealth the General Court has deemed it necessary to establish definite geographical limitations which govern state-chartered financial institutions when considering the location of new branch offices. A co-operative bank, § 12, c. 170, G. L., as inserted by St. 1950, c. 371; a savings bank, § 25, c. 168, G. L. and a savings and loan association, § 34, c. 93, G. L. may thus establish a branch in a town not more than fifteen

miles distant from its main office. Savings banks and state savings and loan associations are engaged in substantially the same type of business and are similar in all pertinent respects to federal savings and loan associations. Federal savings and loan associations and Massachusetts co-operative banks are "substantially similar" in that both classes of associations appeal to the same type of borrower and are, in fact, in direct competition with one another. *Commissioner of Corporations* v. *Flaherty*, 306 Mass. 461, cert. denied, 312 U. S. 680.

The General Court, in enacting § 37A, was acting properly under its police power in order to guard the prosperity of its citizens. *Halter* v. *Nebraska*, 205 U. S. 34, 40, 41. The state has the power to legislate in this manner because it has been universally held that the banking business is of such character as to come within the scope of the internal police power of the state. *Cosmopolitan Trust Co.* v. *Mitchell*, 242 Mass. 95; *In re Opinion of the Justices*, 278 Mass. 607; *Lowell Co-operative Bank* v. *Co-operative Central Bank*, 287 Mass. 338. See also *Ex parte Tennessee Valley Bank*, 231 Ala. 545; 166 So. 1; *Dorsey* v. *Murphy*, 188 Miss. 291; 194 So. 603; *Frankini* v. *Bank of America National Trust and Savings Assoc.*, 88 P. 2d. 790; *Therrell* v. *Smith*, 124 Fla. 197; 168 So. 389; *Budnik* v. *Citizens Trust and Savings Bank*, 220 Ind. 410; 44 N. E. 2d. 298.

Acting properly within its police power the General Court has enacted § 37A, c. 167, G. L. which is the only law on the subject. *Cooley* v. *The Board of Wardens*, 12 How. 299; *Kelly* v. *Washington*, 302 U. S. 1; *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79. This statute does not in any manner frustrate the purposes for which the federal agency was created, nor does it, in any way, impair its efficiency as a federal agency, and therefore is a proper exercise of its

police power. *First National Bank* v. *Missouri*, 263 U. S. 640; *Commissioner of Corporations and Taxation* v. *Malden*, 327 Mass. 271, 273, 274. Furthermore, it does not conflict with any federal law or regulation on the subject. *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 566. A contention by the defendants that § 37A, c. 167, G. L. cannot properly be applied to federal savings and loan associations because the federal government has pre-empted the field, is not a cogent or sound argument because there is no federal law or regulation which determines the locus of a branch of a federal savings and loan association with respect to its main banking house. Where the federal government has not pre-empted the field, a state law is applicable. *Commonwealth* v. *McHugh*, 326 Mass. 249, 266. Since § 37A does not conflict with nor interfere with a federal law or regulation on the subject, and because it does not frustrate the purposes for which the Home Loan Bank Board was created or impair its efficiency as a federal agency, it therefore follows that said § 37A is applicable to branches of federal savings and loan associations.

This statute does not interfere with the operation of a federal savings and loan association provided that such association conforms to state law, in the field of branch banking, affecting similar state-chartered financial institutions. See *First National Bank* v. *Missouri*, *supra*. It is in no way discriminatory. It is merely an expression of the General Court in the field of banking, because banking is a "business affected with a public interest; its nature making it peculiarly an object of legislative solicitude in order that depositors and stockholders [shareholders] may be protected according to legislative theories of public welfare." *Runcie* v. *Bankers Trust Co.*, 11 N. Y. S. 2d. 924. It is simply an instance "where the State law is somewhat more inclusive than the Federal law

. . ." and ". . . in the absence of complete pre-emption of the field . . ." the state law is paramount. *Commonwealth* v. *McHugh, supra.*

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction . . . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' . . . the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules." *Kelly* v. *Washington, supra,* 9, 10, 15 and cases cited.

It has also been clearly enunciated that the intention to exclude a state from exercising its police power must be clearly manifested. *Commonwealth* v. *McHugh, supra; Napier* v. *Atlantic Coast Line R. R.* 272 U. S. 605; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749.

Conclusion.

The police power of a state is reserved to it under the provisions of the Tenth Amendment to the Constitution of the United States. A review of the authorities clearly indicates that the prosperity and economic well-being of its citizens is an apt subject for the exercise of this reserved police power.

As stated and supported by decisions above, an expression of the reserved police power of a state is not to be presumed contravened by a federal act unless, in so legislating, the state has conflicted with the purpose or frustrated the end, for which purpose or end the federal government entered the field. It is also clearly enunciated and supported by the judicial decisions above, that the entry into a field by the federal government is not tantamount to the occupation of the field and the intent to so pre-empt a field must clearly be manifested in the enabling act itself.

In consideration, therefore, of the principles of law discussed and to which this brief has been confined, the applicability of § 37A, c. 167, G. L.; § 25, c. 168, G. L.; § 12, c. 170, G. L., and § 34, c. 93, G. L., becomes obvious in the instant case. They provide the standard with reference to distance from a main banking house at which a branch may be established. The quasi-public character of the banking industry as well as the experience of the past is reflected in this legislation.

It cannot be seriously contended that Congress was blind to the character of the institutions involved in its legislation nor unaware of the dangers that could result from permitting an area to become overbanked. Rather it is evident, from the language of the act itself, that Congress was aware of the character and alerted to this danger for the section of

the act which delegates chartering authority to the Home Loan Bank Board, 12 U. S. C. § 1464 (a), specifies that charters to federal savings and loan associations are to be granted only "after giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

It is submitted that the General Court has in the provisions of § 37A, c. 167, G. L.; § 25, c. 168, G. L.; § 12, c. 170, G. L., and § 34, c. 93, G. L., given voice to the best practices of local mutual thrift and home-financing institutions. It is further submitted that since, in the case at bar, the federal government has not occupied the field, and the state statutes do not conflict nor interfere with the operation of the federal act, and because they are a valid expression of the reserved police power of the state in an area involving the public welfare, then it is the conclusion of *Amicus Curiae* that federal savings and loan associations are not exempt from the operation of the said statutes.

Because of the obvious importance of the issue in this case we respectfully request that this Court issue its writ of certiorari as asked for in the petition.

Respectfully submitted,

DEPARTMENT OF BANKS,
COMMONWEALTH OF MASSACHUSETTS.

By **TIMOTHY J. DONOVAN,**
Commissioner.

JOHN P. CLAIR,
Attorney.